(14)

No. 05-595

Supreme Court, U.S.
FILED
OCT 20 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

GEORGE J. CHANOS
Attorney General of the State of Nevada
GERALD GARDNER
Chief Deputy Attorney General
Counsel of Record
VICTOR-HUGO SCHULZE, II
Senior Deputy Attorney General
RENE L. HULSE
Senior Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3420
Counsel for Petitioner

October 20, 2006

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Table of Authorities ii

Summary of Argument 1

Argument 3

I. *CRAWFORD* IS NOT A RULE WITHOUT WHICH THE LIKELIHOOD OF AN ACCURATE CONVICTION IS SERIOUSLY DIMINISHED . . . 3

II. THE *CRAWFORD* RULE IS NOT A SWEEPING RULE 5

III. *CRAWFORD* DIFFERS SUBSTANTIALLY FROM *GIDEON* IN SCOPE AND OPERATION, AND IN ITS HISTORICAL UNDERPINNINGS 8

IV. 28 U.S.C. SECTION 2254(D) DOES NOT ADOPT THE *TEAGUE* EXCEPTIONS FOR WATERSHED RULES 14

Conclusion 20

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466 (2000) 12, 14

Beard v. Banks,
542 U.S. 406 (2004) 7

Betts v. Brady,
316 U.S. 455 (1942) 10, 11

Blakely v. Washington,
542 U.S. 296,124 S.Ct. 2531,
159 L.Ed. 2d 403 (2004) 9, 12

Bockting v. Bayer,
399 F.3d 1010 (9th Cir. 2005) 4, 15

Bockting v. Bayer,
418 F.3d 1055 (9th Cir. 2005) 11

Bockting v. State,
109 Nev. 103, 847 P.2d 1364 (Nev. 1993) 15

Brown v. Uphoff,
381 F.3d 1219 (10th Cir. 2004) 14

Crawford v. Washington,
541 U.S. 36 (2004) . . . . . *passim*

Crespin v. New Mexico,
144 F.3d 641 (1998) 14

Davis v. Washington, ___ U.S. ___,
126 S.Ct. 2266 (2006) 6

DeStefano v. Woods,
392 U.S. 631 (1968) 13

Dodd v. United States,
545 U.S. 353 (2005) 17

Duncan v. Louisiana,
391 U.S. 145 (1968) 13

Georgia v. Brailsford,
3 Dall. 1, 1 L. Ed. 483 (1794) 9

Gideon v. Wainwright,
372 U.S. 335 (1963) . . . . . *passim*

Hamdan v. Rumsfeld,
___ U.S. ___, 126 S. Ct. 2749 (2006) 17

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 18, 19

Idaho v. Wright,
497 U.S. 805 (1990) 15, 16

Lockyer v. Andrade,
538 U.S. 63 (2003) 17, 18, 19

O'Dell v. Netherland,
521 U.S. 151 (1997) 7, 12

Ohio v. Roberts,
448 U.S. 56 (1980) 4, 6, 7, 12, 15

Pointer v. Texas,
380 U.S. 400 (1965) 11

Powell v. Alabama,
287 U.S. 45 (1932) 10

Sawyer v. Smith,
497 U.S. 227 (1990) 4, 12

Schriro v. Summerlin,
542 U.S. 348 (2004) 9, 10, 12, 13, 15

Teague v. Lane,
489 U.S. 288 (1989) . . . . . *passim*

Tyler v. Cain,
533 U.S. 656 (2001) 3, 7

United States v. Mora, 293 F.3d 1213 (10th Cir.),
cert. denied, 537 U.S. 1098 (2002) 14

Williams v. Taylor,
529 U.S. 362 (2000) 19

Statutes:

28 U.S.C. § 2254 18
28 U.S.C. § 2254 (d) 2, 14, 16, 19, 20
28 U.S.C. § 2254 (d) (1) 14, 16, 17

Other Authorities:

Berry, Melissa M., *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, Cath. U. L. Rev. 747 (Sp. 2005) 18

3 W. Blackstone, Commentaries on the Laws of England 380 (1768) 9

In the
Supreme Court of the United States

GLEN WHORTON, Director,
Nevada Department of Corrections,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

Respondent Bockting argues in his Merits Brief that this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), should apply retroactively to cases on collateral review under the standards set forth in *Teague v. Lane*, 489 U.S. 288 (1989). This argument is premised on two points. First, Bockting asserts that *Crawford* increases accuracy in criminal proceedings because it replaced an unpredictable rule with one that addresses the issue of reliability in the manner envisioned by the framers. Second, Bockting argues that *Crawford* is like *Gideon v. Wainwright*, 372 U.S. 335 (1963), in several particular ways. This Court has held that *Gideon* exemplifies a new rule that would qualify under the second

Teague exception for retroactive application of new procedural rules as a watershed rule. Bockting equates *Crawford* to *Gideon* arguing that both cases replaced an existing rule that utilized an unreliable and unpredictable case-by-case assessment with an explicit rule. Bocting also asserts both cases changed our understanding of a constitutional right at a conceptual level, but did not create a new right. According to Bockting, then, the perceived similarities lead to the conclusion that *Crawford* should be applied retroactively to cases on collateral review, such as the case at hand.

Respondent Bockting's argument completely misses the mark in a number of fundamental ways. The argument both includes points previously rejected by this Court as irrelevant to the retroactivity analysis, and at the same time excludes important, and essential, points that are central to the retroactivity analysis. Because Bockting's argument strays from the strict analytical process set forth in *Teague* and its progeny, he fails to address those essential points of legal relevance to the retroactivity analysis.

Likewise, Bockting's argument on whether 28 U.S.C. Section 2254(d) adopts the *Teague* exceptions for private conduct beyond criminal proscription and watershed rules is premised on a tortured reading of Section 2254(d) and a wholly unnecessary statutory construction analysis. The statute's language is plain on its face, and constitutes a clear statement of the intent of Congress to change existing law. The Court has settled the question by deciding that it is the law existing at the time of the relevant state court decision that controls the question of whether the state court decision is contrary to established federal law.

ARGUMENT

I. *CRAWFORD* IS NOT A RULE WITHOUT WHICH THE LIKELIHOOD OF AN ACCURATE CONVICTION IS SERIOUSLY DIMINISHED.

In his Merits Brief, Bockting fails to address the central issue of whether the new rule of *Crawford* is a rule without which the likelihood of an accurate conviction is seriously diminished. By neglecting this most central point, Bockting imperils his entire position.

The Petitioner argued extensively in the Merits Brief that the new rule of *Crawford* was not a watershed rule, because it was not a rule without which the likelihood of an accurate conviction is seriously diminished. Thus, the rule of *Crawford* is not amenable to retroactive application. But for the Ninth Circuit, all of the many circuit courts and state courts that have addressed whether *Crawford* applies retroactively agree with Petitioner's position. The Petitioner supported this argument with holdings from this Court and other courts, along with detailed analysis. The existence of this first prong of the two-pronged watershed standard, like the second for bedrock principles, is mandatory if a rule is to receive retroactive application. *Tyler v. Cain*, 533 U.S. 656, 665 (2001). Yet, Bockting neither argues nor shows that the *Crawford* rule meets this specific accuracy test. Bockting appears to briefly argue that *Crawford* may affect accuracy because it "created a new standard for accuracy," and that the *Crawford* rule is directed toward reliability. Resp.Br. 14, 21. This analysis is beside the point in the *Teague* analysis, as it fails to address the seminal issue of accuracy in the manner that *Teague* did.

Bockting errs in precisely the same way that the Ninth Circuit erred when it discussed the general benefits of confrontation, rather than the relevant core question—whether the new rule substantially increases the likelihood of an accurate conviction when compared to the former rule. Bockting has repackaged Judge McKeown's erroneous conclusion in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005) (*Bockting I*) that confrontation is designed to promote accuracy. JA 128. As the dissent in *Bockting I* observed, Judge McKeown asked the wrong question in reaching her conclusion that *Crawford* applies retroactively because confrontation generally fosters accuracy. JA 149. Bockting's argument adopts the same error.

As Judge Wallace pointed out, the question is not whether testimony that has been subject to cross-examination is more likely to be reliable than that which was admissible under the regime of *Ohio v. Roberts,* 448 U.S. 56 (1980), but whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is one without which the likelihood of an accurate conviction is seriously diminished. JA 149-150. It is the *differential benefit to accuracy* of the new rule that must be assessed, and yet neither the circuit court majority, nor Bockting, addressed this mandatory analytical component of the watershed standard.

Moreover, Bockting makes the same mistake previously rejected by the Court in *Sawyer v. Smith*, 497 U.S. 227 (1990). Bockting argues only that *Crawford* "is entirely directed toward reliability under the *Teague* standard..." Resp.Br. 21. Bockting forwards the same argument rejected by this Court in *Sawyer* that it is enough under *Teague's* watershed rule that a new rule be aimed at improving the accuracy of trial. *Sawyer*, 497 U.S. at 242. This argument

fails to properly address the correct standard because increased accuracy alone is not sufficient. The correct test is whether the new rule is one without which the likelihood of an accurate conviction is *seriously diminished*, along with the second mandatory prong—that the new rule must be sweeping and fundamentally groundbreaking so as to alter our understanding of bedrock procedural elements. Bockting, like the majority below, is attempting to lower the standard for watershed rules.

II. THE *CRAWFORD* RULE IS NOT A SWEEPING RULE.

Bockting also fails to address the petitioner's argument that the *Crawford* rule is not a sweeping rule. Instead, Bockting argues that *Crawford* is like *Gideon* and unlike any case in recent constitutional jurisprudence. Resp.Br. 29. Although this argument points to no more than immaterial similarities, it does hint at a point quite the opposite from that Bockting seeks to make. In fact, the new rule of *Crawford* is unique in its effect on trial practice and the rights of criminal defendants. New procedural rules generally increase the scope of constitutional protections available to criminal defendants. *Crawford,* however, announced a new rule that at once created a new burden on states by requiring an actual opportunity for cross examination of a witness rather than allow his or her testimonial hearsay through another witness, and yet substantially *limited* the *scope* and *reach* of the Confrontation Clause. For the first time, *Crawford* now excludes non-testimonial hearsay from Sixth Amendment protection.

Post-*Crawford* confrontation, as a legal concept, is an entirely different animal than pre-*Crawford* confrontation, because the right to confront under the Sixth Amendment has

been limited to the single context of testimonial hearsay. Prior to *Crawford*, the Sixth Amendment right to confrontation implicated *any* hearsay evidence that the prosecutor wanted to introduce. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Within the context of testimonial hearsay, *Crawford* increased the states' burden to provide an opportunity for cross examination or to find such testimony excluded. The Sixth Amendment bars the admission of testimonial hearsay statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant has a prior opportunity for cross examination. *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 2273 (2006). The flexibility offered by the former *Roberts* rule has been taken from the states and replaced by a rigid rule requiring actual, rather than substituted, cross examination.

Crawford, however, also significantly narrowed the *scope* of Sixth Amendment protection to exclude most hearsay. Now, only testimonial hearsay is protected by the Sixth Amendment. In separating general hearsay concepts from Sixth Amendment confrontation principles, the Court held in *Crawford* and *Davis* that the Confrontation Clause no longer implicates non-testimonial hearsay evidence: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis*, ___ U.S. at ___, 126 S. Ct. at 2273. Because of this narrowing process, *Crawford* is not a sweeping rule, and therefore not a watershed rule.

The instant case is an excellent example of the narrowing of the Sixth Amendment. Here, Detective Zinovich's testimony would fall under the admissibility bar of *Crawford* and *Davis*. As a state agent, the detective collected evidence for prosecution when he interviewed the child rape victim.

The testimony of the child's mother, while previously protected under the umbrella of the Sixth Amendment and the prophylactic *Roberts* process, is, however, no longer subject to any Sixth Amendment protections. Now, there is no Sixth Amendment protective device for the non-testimonial hearsay presented by the mother of the child victim. Had the child told a neighbor of her step-father's sexual attacks, or a teacher, school nurse, or a friend, all of this testimony would not be inadmissible under the Sixth Amendment in the post-*Crawford* context.

This Court held in *Tyler v Cain*, 533 U.S. 656 (2001), that for a new procedural rule to be considered a watershed rule, it must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. The Court further held in *O'Dell v. Netherland*, 521 U.S. 151 (1997), and *Beard v. Banks*, 542 U.S. 406 (2004), that a new rule is not a bedrock procedural element under the *Teague* standard unless it is as "sweeping" and groundbreaking, core to the criminal process, such as the right to counsel in *Gideon*. The rule of *Gideon* applied to every criminal defendant in every serious criminal case—the ex nihilo creation of a new fundamental right. In contradistinction, *Crawford* substantially narrowed the scope and reach of the Confrontation Clause to the single subject of *testimonial* hearsay, rather than the broader context of hearsay in general. It cannot be said that the *Crawford* rule is as sweeping and groundbreaking as was the general and broad-based right to counsel that was pronounced in *Gideon*.

III. *CRAWFORD* DIFFERS SUBSTANTIALLY FROM *GIDEON* IN SCOPE AND OPERATION, AND IN ITS HISTORICAL UNDERPINNINGS.

Bockting argues that *Crawford* is similar to *Gideon* in a number of respects. In forwarding this argument, however, Bockting is forced to rely on immaterial (and in some cases, non-existent) similarities. At the same time, Bockting ignores or glosses over the many profound and basic points of complete dissimilarity between these decisions. All of the many federal and state courts,[1] save for the Ninth Circuit, that have rejected the retroactive application of *Crawford*, have implicitly, if not explicitly, rejected any argument that *Crawford* is on par with *Gideon* in any material manner. Pet.Br. 15. In his dissent from the Ninth Circuit's denial of en banc reconsideration, Judge O'Scannlain rightly observed that "*Crawford* hardly bears comparison with *Gideon*...The *Crawford* rule simply does not approach [its] magnitude...The two judge *Bockting* majority thus stands alone in its conviction that *Crawford* applied retroactively." JA 215, 223. Yet, Bockting still attempts to find similarities in such diametrically different decisions.

Bockting argues, for example, that *Crawford* and *Gideon*, represented a return to original constitutional principles. This argument misses the mark for two reasons. First, as explained immediately below, *Gideon* did not represent a return to an earlier principle, but rather, as explained by Judge O'Scannlain in his dissenting opinions, it was a

---

[1] Courts finding that *Crawford* does not apply retroactively include the Second, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, as well as state appellate courts in Florida, Kansas, Colorado, California, Minnesota, and Washington.

groundbreaking new rule that announced not just a new rule that "reshaped the contours" of an existing right as did *Crawford*, but was one that announced, ex nihilo, a *new fundamental right* that did not previously exist: the general right to counsel in serious cases without a need to find "special circumstances." JA 215.

Further, and as important to the analysis of Bockting's "original principles" argument, is the clear fact that this Court has wholly rejected this same argument in the context of *Teague's* watershed standard. This argument clearly confuses the appropriate *Teague* standard with irrelevant musings about the Founders' beliefs, and the argument improperly leads away from the relevant test for watershed rules. In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court felt obligated to correct the inmate's deviation from the proper standard, and said of an inmate's similar confusion of the *Teague* standard with an original principles argument:

> Respondent [inmate Summerlin] further notes that common-law authorities praised the jury's factfinding ability. See, *e.g.*, 3 W. Blackstone, Commentaries on the Laws of England 380 (1768); *Georgia v. Brailsford*, 3 Dall. 1, 4, 1 L. Ed. 483 (1794) (jury charge of Jay, C.J.).
>
> The question here is not, however, whether the Framers believed that juries are more accurate factfinders than judges (perhaps so-they certainly thought juries were more independent, see *Blakely v. Washington*, post, 542 U.S. 296, ___ - ___, 124, S.Ct. 2531, 2538-40, 159 L.Ed. 2d 403, 2004 WL 1402697). Nor is the question whether juries actually are more accurate factfinders than judges (again, perhaps so). ***Rather, the question is whether judicial***

> ***factfinding so 'seriously diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach...The evidence is simply too equivocal to support that conclusion.***

Summerlin, 542 U.S. at 355-56 (emphasis added). It appears from the Court's comments concerning the inmate's original principles argument in *Summerlin* that it views such argument as deviating from the only relevant inquiry—that of the oft-stated watershed standard.

Bockting's second point in his similarity argument is that *Crawford* is like *Gideon* because neither created a new right, but merely changed the understanding of a constitutional right at a "conceptual level." This argument relies on a fundamental misunderstanding of *Gideon*. *Gideon* is unique in that it announced a new rule that *also* created a new fundamental right. Prior to *Gideon*, the Court had not established a general right to counsel in all felony cases in state prosecutions, including a right to the appointment of counsel in indigent cases at public expense. Bockting concedes this point. Resp. Br. 24. In *Betts v. Brady*, 316 U.S. 455 (1942), the Court considered whether the concept of due process incorporated in the Fourteenth Amendment obligated the states to furnish counsel in felony cases, there, for a charge of robbery for which the defendant received a sentence of eight years. The Court held that the Fourteenth Amendment did not require the appointment of counsel.[2] In

---

[2] Justice Harlan's concurring opinion in *Gideon* observed that the Court's most immediate pre-*Betts* decision, *Powell v. Alabama*, 287 U.S. 45 (1932), was not in conflict with *Betts*, as that decision was a capital case where the Court found that, under the particular facts there presented, the ignorance and illiteracy of the defendants, along with their youth and demonstrated community hostility were

Gideon, the issue was whether the Court should reconsider the *Betts* decision. *Gideon*, 372 U.S. at 338. The *Gideon* Court observed that in *Betts*, it had concluded that the appointment of counsel to indigents in serious cases was not a fundamental right, essential to a fair trial that was extended through the Fourteenth Amendment to the states. *Gideon*, 372 U.S. at 340. The *Gideon* Court reversed the *Betts* decision, and held for the first time that the general right to counsel in all serious cases such as Clarence Gideon's (his sentence was five years' imprisonment) was a fundamental right that extended the Sixth Amendment right to the states through the Fourteenth Amendment. *Gideon*, 372 U.S. at 342. In his dissent in *Bockting v. Bayer*, 418 F.3d 1055 (9th Cir. 2005) (*Bockting III*), Judge O'Scannlain noted that the *Gideon* Court, had by this action, created the right ex nihilo to counsel in state prosecutions. JA 215.

Conceptually, in attempting to compare *Crawford* with *Gideon*, Bockting confuses *Crawford* with *Pointer v. Texas*, 380 U.S. 400 (1965). In *Pointer*, the Court extended the right of confrontation to the states. Accordingly, *Pointer* created the underlying right to confrontation in state prosecutions, whereas *Crawford* reshaped the contours of that right. But *Crawford* is not *Pointer*. *Crawford* created no new fundamental right, while *Gideon* created a new right.

The uniqueness of *Gideon* is core to the analysis, because each of the rights that have formed the basis for this Court's

---

the factors that guided the decision. *Gideon*, 372 U.S. at 349-50 (Harlin, J., concurring). Justice Harlan recognized that the pre-*Gideon* law on the appointment of counsel to indigent defendants turned on the existence of "special circumstances," and did not reflect a general right to counsel. *Id.*

Teague jurisprudence have been vitally important rights that both fostered accuracy *and* improved the operation of fairness and due process. Yet, none of the new rule cases considered by the Court since *Teague* has been found to be a watershed decision:

> Indeed, *Crawford's* rule does less to decrease the chance of an inaccurate conviction than many rules that have been held *not* to apply retroactively...
>
> A parallel principle governs this case: even though the Confrontation Clause demands the exclusion of out-of-court testimony—and even though blanket exclusion of such testimony may, in fact, be more accurate than the more nuanced rule of *Roberts*—there is little reason to think that judicial determination of reliability so seriously diminishes accuracy as to make likely the conviction of the innocent. If *Apprendi*, *Ring*, and *Blakely*, with their massive implications striking to the core of our system of criminal justice, were not watershed rules with retrospective application, then surely the relatively minor—though still quite significant—change wrought by *Crawford* is not either.

JA 216, 221 (Judge O'Scannlain, dissenting). To these cases cited by Judge O'Scannlain, the Petitioner would add the decisions of *Sawyer*, *Summerlin*, and *O'Dell*, all of which held that new rules that directly implicated core fundamental rights in capital sentencing proceedings, and that were designed to foster fairness and accuracy in those proceedings, were held not to be watershed rules. *Crawford*, likewise, is not a watershed rule.

In *Summerlin*, the Court observed that:

> Our decision in *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed. 2d 1308 (1968) (per curiam), is on point. There we refused to give retroactive effect to *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), which applied the Sixth Amendment's jury-trial guarantee to the States...We concluded that '[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial.' 392 U.S., at 634, 88 S.Ct. 2093. If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.

Summerlin, 542 U.S. at 356-57. In this regard, *Summerlin* controls this retroactivity analysis. If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, and if under *Summerlin* a trial held without a jury in the capital sentencing phase was not impermissibly inaccurate, it is equally hard to see how a trial in which a judge, who does no more than make findings of reliability of a hearsay witness, would implicate impermissible inaccuracy.

Crawford, furthermore, as a rule that reshaped the contours of the already-existing right to confrontation, in distinction to one that created ex nihilo a new right, is a right subject to harmless error analysis. If the right to confrontation is subject to harmless error analysis, and can therefore be dispensed with based on other case variables such as the strength of the state's case, it is impossible to conclude that the right is so central to bedrock principles of criminal

procedure that it is a watershed rule. In rejecting retroactive application for *Crawford*, the Tenth Circuit held that watershed status and harmless error are incompatible:

> Unlike *Gideon*, *Crawford* does not 'alter[ ] our understanding of what constitutes basic due process,' *Mora*, 293 F.3d at 1219, but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. *Crespin v. New Mexico*, 144 F.3d 641, 649 (1998). It would, therefore, be difficult to conclude that the rule in *Crawford* alters rights fundamental to due process. See *Mora*, 293 F.3d at 1219 (holding that *Apprendi v. New Jersey* did not alter fundamental due process rights, in part because *Apprendi* errors could be excused given overwhelming evidence). Accordingly, we conclude that *Crawford* is not a watershed decision and is, therefore, not retroactively applicable to Brown's initial habeas petition.

Brown v. Uphoff, 381 F.3d 1219, 1226-27 (10th Cir. 2004). *Crawford* did not create a new fundamental right and is intrinsically different from *Gideon*. Bockting's argument for retroactive application of *Crawford* based upon perceived similarities to *Gideon* must be rejected.

IV. 28 U.S.C. SECTION 2254(D) DOES NOT ADOPT THE *TEAGUE* EXCEPTIONS FOR WATERSHED RULES.

Respondent Bockting and amicus Public Defender Service for the District of Columbia (P.D.S. amicus) argue that the controlling statute, 28 U.S.C. Section 2254(d)(1),

incorporates the exceptions to retroactivity under *Teague* for private conduct beyond criminal proscription and watershed rules. The primary weakness in Bockting's argument is that it ignores the palpable tension that exists between the plain language of the statute and the *Teague* exceptions that are exemplified by Judge McKeown's opinion below. The tension in Judge McKeown's words is unavoidable; the position that the statute adopts the *Teague* exceptions results in an illogical and absurd reading of what P.D.S. amicus for the Respondent concedes repeatedly is plain statutory language. P.D.S. Br. 2. Under that analysis, the Nevada Supreme Court's decision in applying *Idaho v. Wright* and *Ohio v. Roberts* was objectively reasonable for eleven years, and then suddenly, somehow, became objectively *unreasonable* upon the announcement of *Crawford* in 2004. Neither the Ninth Circuit panel in *Bockting I* nor Respondent's amicus explain how such an ex post facto logical reconfiguration can occur.

> The Nevada Supreme Court relied on *Roberts* to conclude that Autumn was 'unavailable' and that her statements bore the requisite 'particularized guarantees of trustworthiness.' Bockting v. State, 109 Nev. 103, 847 P.2d 1364, 1367-70 (Nev. 1993). As we know now, but the Nevada Supreme Court could not have divined, *Crawford* dictates the right to cross-examine the witness. The progeny of *Roberts*, such as the multi-factor reliability test developed in *Idaho v. Wright*, 497 U.S. 805, 821-22, 110 S.Ct. 3139, 111 L.Ed. 2d 638 (9th Cir. 1990) (sic) cannot override the right of confrontation. Thus, the Nevada Supreme Court's decision was 'contrary to' established Supreme Court precedent in *Crawford*, as made retroactive under *Teague* and *Summerlin*.

JA 136. The unmistakable illogic of this position is that it at once concedes the correctness of the state court's application of federal law, and yet at the same time accuses the same state court of deciding the question in a manner that was contrary to federal law. Both precepts cannot be correct.

Because the Nevada Supreme Court's decision in Bockting's case preceded *Crawford* by eleven years, it is not logically possible for that decision to be contrary to *Crawford*. When Bockting was first before this Court in 1990, on certiorari following his direct appeal, the matter was remanded back to the Nevada Supreme Court with instruction to reconsider its decsion in light of *Idaho v. Wright*, 497 U.S. 805 (1990). JA 44. The Nevada Supreme Court did exactly that, and applied that law which was clearly established—*Idaho v. Wright*. JA 45-60. For Bockting's argument to be accepted, this Court would have to accept a wholly unpredictable and fickle definition of the plain statutory term "clearly established Federal law," one that would be unstable, variable, and ever-changing. Such an oscillating standard would make impossible any sense of finality based on the good faith application of existing law by state courts in the face of new rules from this Court.

It is curious indeed that Respondent's P.D.S. amicus engages an interpretive process analyzing a purported "perverse incentive structure" (P.D.S. Br. 14) and compares Section 2254(d) to external provisions to draw out the meaning of Section 2254(d)(1) in light of the fact that P.D.S. amicus and Bockting agree that the statutory language is plain on its face. The Petitioner is not alone in its position that "the statute freezes the applicable law for state prisoners on federal habeas review to law 'that exists at the time the state court decision is made." P.D.S. Br. 14, 15. The plain and unambiguous language of the statute, set forth in the *past*

tense as a participle ("established," rather than "to be established at a future time") serves as the unmistakably clear statement required by *Hamdan v. Rumsfeld*, ___ U.S. ___, 126 S. Ct. 2749, 2764 (2006), that P.D.S. amicus asserts is missing. Such a lengthy statutory construction exercise is unnecessary. "[W]hen the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Dodd v. United States*, 545 U.S. 353, 359 (2005). This Court should quickly decline Bockting's invitation to redefine the plain words of the statute and to add words that are not there.

This is especially true in light of the fact that this Court has already recognized that the words of the statute mean precisely what they say. Surprisingly, however, Bockting and P.D.S. amicus give short shrift to the controlling case on this point. Petitioner has already pointed out that this Court in *Lockyer v. Andrade*, 538 U.S. 63 (2003), recognized that the timing of the clearly established Federal law requirement in Section 2254(d)(1) as being "at the time the state court renders its decision." *Andrade*, 538 U.S. at 71. Bockting assails the reasoning of the Court because, he asserts, this language does not appear in the statute itself. (Resp. Br. 35). But of course, it does, as the term "clearly established" is presented in the past tense. Because the statutory provision is plain on its face, and because the Court has settled the question of its meaning, reliance on statutory construction rules is unnecessary. This issue is settled.

Even if construction were necessary, Bockting might have noted reference to the one pre-AEDPA case where the same term was defined harmoniously with the Court's subsequent *Andrade* decision; one would need to look no further than the legislative history and early decisions of this Court defining

the same term to find that the intent, and indeed the genesis itself, of the "clearly established" language demonstrates that it refers to the time of the state court decision, as the Court has recently repeated in *Andrade*. A commentator recently observed:

> While the legislative history does shed some light on how the standard of review provisions were intended to operate, it does not specifically address the meaning of 'clearly established Federal law as determined by the Supreme Court.'
>
> The closest reference to the clearly established language was a reference to the governmental qualified immunity doctrine in tort law when Senator Orrin Hatch, the primary sponsor of § 2254, referred to *Harlow v. Fitzgerald* [457 U.S. 800 (1982)]. Arguably, that reference was not made as a suggestion to adopt the same 'clearly established' standard from the qualified immunity context, but rather to 'compare[ ] the deference provisions in the habeas reforms to the preference for reasonableness that courts give in other areas of the law.'

Berry, Melissa M., *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, Cath. U. L. Rev., 747, 761-64 (Sp. 2005).

But the suggestion that the reference was, in fact, intended to adopt the same "clearly established" standard should not be so quickly dispensed with, especially in light of the Court's decision in *Andrade* that also concluded that the time of the relevant state court decision controls the question. In *Harlow*, the Court took the opportunity to define the term "clearly

established law" in the context of qualified immunity for government officials. The Court's decision was based, in great part, on the need for predictability and the need for officials to have notice of what the law demanded of their actions *at the time of those actions*:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful...
>
> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

Harlow, 457 U.S. at 818, 819. This early view of the relevant timing of clearly established law is fully consonant with the plain meaning of the statutory provision and with the decisions in *Andrade* and *Williams v. Taylor*, 529 U.S. 362, 412 (2000). It is the clearly established law existing at the time that the official acts, and not after a later change in law, that determines the immunity of the official.

Like the holding in *Harlow*, Section 2254(d) legislates a specific and logical relationship between the timing of an act, the state's decision, and the state of the relevant law at *that* time. Under *Harlow*, the state of the law at the time the official acts controls the question of immunity. Likewise, under *Andrade*, the state of the law at the time the state court acts controls the question of whether the state court's decision was contrary to federal law. Just as the official cannot be held liable for the future state of the law of which he has no

notice, a state's strong interest in the finality of criminal judgments cannot be penalized based on future and unpredictable changes in the law. This reading of Section 2254(d) avoids the logical pitfalls of Judge McKeown's view that the Nevada Supreme Court's decision in 1993 was contrary to law that did not exist, and of which she concedes the court could not have divined. As this Court has stated, "clearly established Federal law" under Section 2254(d) refers to decisions of the Court as of the time of the relevant state court decision is rendered.

CONCLUSION

Petitioners reassert their request that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

GEORGE J. CHANOS
Attorney General
of the State of Nevada

GERALD GARDNER
Chief Deputy Attorney General
Counsel of record

VICTOR-HUGO SCHULZE, II
Senior Deputy Attorney General

RENE L. HULSE
Senior Deputy Attorney General